UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**CV 15-8673 RGK (SPx)**	Date	April 1, 2016
Title	***Wendy Chowning v. Kohl's Department Stores, Inc.***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Plaintiff's Motion for Class Certification (DE 51)**

I. INTRODUCTION

On July 21, 2015, Wendy Chowning and Lourdes Casas, individually and on behalf of all others similarly situated ("Class Members"), filed a Complaint against Kohl's Department Stores, Inc. ("Defendant"). On January 20, 2016, the plaintiffs filed a First Amended Complaint ("FAC") in which Lourdes Cases was removed, leaving Wendy Chowning as the only named plaintiff ("Plaintiff"). The FAC alleges violations of the following California statutes: (1) False Advertising Law ("FAL"), (2) Unfair Competition Law ("UCL"), and (3) Consumer Legal Remedies Act ("CLRA").

On March 15, 2016, this Court granted Defendant's Motion for Summary Judgment as to the monetary claims for restitution under the FAL, UCL, and CLRA.

Presently before the Court is Plaintiff's Motion for Class Certification. For the following reasons, the Court **DENIES** Plaintiff's Motion.

II. FACTUAL BACKGROUND

Plaintiff alleges the following facts:

Defendant is a large national retailer that owns and operates approximately 100 retail stores within California. The majority of Defendant's sales have historically derived from exclusive and private label brands. These products are sold exclusively at stores owned, operated, and licensed by Defendant. As such, Defendant defines, sets, and controls all prices for these products.

Each exclusive and private label brand that Defendant offers for sale in its stores displays two prices: (1) the selling price and (2) a significantly higher price that is represented to be the item's "regular" or "original" price ("Actual Retail Price" or "ARP"). By simultaneously displaying these two prices, Defendant leads consumers to believe that they are receiving a certain discount. Plaintiff and putative class members reasonably believed that the ARPs represented the price at which Defendant regularly sold each respective item, and that they were receiving a significant discount. The price-comparison-advertising scheme induced Plaintiff and putative class members to purchase Defendant's private label items.

Plaintiff alleges that the ARPs affixed to each item in Defendant's California stores were false prices. Plaintiff also claims that the advertised ARPs were not the prevailing market retail prices within the three months immediately preceding the publication of the advertised ARPs, as required by California law. Therefore, Plaintiff asserts, Defendant falsely claims that each of its products has previously sold at a far higher ARP in order to induce Plaintiff and putative class members to purchase merchandise at a purportedly marked down "sale" price.

For instance, on September 13, 2014, Plaintiff purchased a private label dress ("Dress") from Defendant's store. The Dress featured an original price of $70.00 but was purportedly marked down to $21.00—a 70% discount. Plaintiff relied on this price-comparison-advertising scheme in purchasing the Dress. She claims, however, that the alleged markdown was untrue, misleading, and false. According to the FAC, the prevailing retail price for the Dress during the three months immediately prior to the advertisement was materially lower than $70.00 as advertised. Plaintiff also alleges that she purchased a private label robe ("Robe") advertised at an original price of $46.00 and a sale price of $26.99, private label activewear ("Activewear") at an original price of $30.00 and a sale price of $9.99. She claims that the Robe and Activewear also bore false sale prices to ensnare shoppers looking for a deal. (FAC ¶¶30-33, ECF No. 44.)

Plaintiff claims that she and thousands of putative class members were deceived and misled into buying products from Defendant that they would not have purchased if not for Defendant's false advertising. Plaintiff and putative class members lost money and/or property as a result of the fraudulent price-comparison-advertising scheme. In the current motion, Plaintiff seeks to certify the following class:

> All persons who, while in the State of California and between July 21, 2011, and the present (the "Class Period"), purchased from Kohl's one or more private or exclusive branded items at a discounted "sale" price of 30% or more below a stated "Original" or "Regular" price and who have not received a full refund or credit for their purchases.

(Pl.'s Mot. Class Certification 1:20-24, ECF No. 51.)

III. JUDICIAL STANDARD

For certification of a class action under Federal Rule of Civil Procedure 23, the plaintiff bears the burden of establishing each of the prerequisites set forth in Rule 23(a). *Hanon v. Dataproducts, Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Rule 23(a) requires that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

In addition to finding that the requirements of Rule 23(a) have been satisfied, the Court must also find that at least one of the following three conditions of Rule 23(b) is satisfied: (1) the prosecution of separate actions would create risk of (a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b).

IV. DISCUSSION

In light of this Court's prior Order granting partial summary judgment in favor of Defendants, only two claims remain: (1) Injunctive relief under California's consumer protection laws, and (2) Non-restitutionary monetary relief under the CLRA.

A. Injunction Class

Before proceeding to the class certification analysis, the Court holds that Plantiff is barred from pursuing a class seeking injunctive relief based on the rule against duplicative actions.

On June 11, 2015, Steven Russell and Donna Caffey filed a class action complaint against Kohl's Department Stores, Inc. ("Russell Action"). The complaint in the Russell Action alleged that Kohl's advertising practices violated California's False Advertising Law ("FAL") and Unfair Competition Law ("UCL"). Each item that Kohl's offers for sale in its stores displays two prices: (1) the selling price and (2) a significantly higher price that is represented to be the item's "regular" or "original" price ("Actual Retail Price" or "ARP"). Plaintiffs in the Russell Action claimed that the ARPs affixed to each item were false prices that mislead consumers.

On July 21, 2015, Plaintiff filed an identical class action complaint against Kohl's ("Chowning Action"). The complaint in the Chowning Action also alleged that Kohl's advertising practices violated California's FAL and UCL.[1] The allegations in the Chowning Action are premised on the exact same set of facts as those in the Russell Action, namely that the ARPs affixed to Kohl's merchandise were false prices that mislead consumers.

On November 13, 2015, the Chowning Action was designated a related case and transferred to the same docket as the Russell Action. The cases are, in fact, more than just related. Both cases allege the same claims against the same defendant predicated on the identical set of facts. In fact, the class definitions in both Chowning and Russell are substantially similar:

> All persons who, while in the State of California, and between June 11, 2011, and the present (the "Class Period"), purchased from Kohl's one or more items at any Kohl's store in the State of California at a discount of at least 30% off of the stated "original" or "regular" price, and who have not received a refund or credit for their purchase(s). (Russell Mot. Class Certification, No. 15-1143, ECF No. 25.)
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> . . .
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> All persons who, while in the State of California, and between July 21, 2011, and the present, purchased from Kohl's one or more private or exclusive branded item

[1] The Chowning Action also adds a claim for violation of the Consumer Legal Remedies Act ("CLRA").

> advertised at a discount of 30% or more from a stated "original" or "regular" price, and who have not received a refund or credit for their purchase(s). (Chowning FAC, No. 15-8673, ECF No. 44.)

The only difference between these two class definitions is that the Chowning Action limits the class members to consumers who purchased private or exclusive items while the Russell Action includes all items, exclusive or otherwise. In other words, the Russell Action encompasses all of the claims alleged in the Chowning Action.

In light of the substantial overlap between these two cases, the Court previously issued an Order to Show Cause why the Chowning Action should not be dismissed as duplicative. (Order to Show Cause, ECF No. 72.) After considering the parties' responses, the Court declined to dismiss the Chowning action as duplicative on very narrow grounds. (Order Declining to Dismiss Case as Duplicative 3, ECF No. 89.) The Court explained that a rejected class may not bind non-parties. *See Smith v. Bayer Corporation*, 131 S. Ct. 2368, 2380 (2011). In the Russell Action, the Court had rejected a class seeking monetary relief; therefore, Plaintiff was not precluded from pursuing a class action lawsuit "to the extent [she] move[d] to certify a class seeking *restitution or money damages*." (Order Declining to Dismiss Case as Duplicative 3, ECF No. 89.) (emphasis added). Notably, the Court never addressed whether Plaintiff could pursue a class seeking injunctive relief. The Court now takes this occasion to hold that Plaintiff is precluded from pursuing a class seeking injunctive relief, as such a lawsuit would be duplicative of the Russell Action.

"After weighing the equities of the case, the district court may exercise its discretion to dismiss a duplicative later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to consolidate both actions." *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007). "The rule against claim splitting is rooted in the district court's broad discretion to control its own docket as well as the court's interests in judicial economy and efficiency." *Beckerley v. Alorica, Inc.*, No. SACV 14-0836, 2014 WL 4670229, at *4 (C.D. Cal. Sept. 17, 2014). Numerous district courts have exercised their discretion and applied the rule against duplicative actions to dismiss later-filed, identical class actions. *Moreno v. Castlerock Farming & Transp., Inc.*, No. CIV-F-12-0556, 2013 WL 1326496, at *1 (E.D. Cal. Mar. 29, 2013) (collecting cases).

"The rule against duplicative litigation is distinct from but related to the doctrine of claim preclusion or res judicata." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). "While both claim-splitting and claim-preclusion doctrines therefore '[shield] parties from vexatious concurrent or duplicative litigation,' the primary difference is that, in claim-splitting, a litigant is able to move for dismissal without demonstrating that 'a court of competent jurisdiction has entered a final judgment on the merits' in the first action." *Cook v. C.R. England, Inc.*, No. CV 12-3515, 2012 WL 2373258, at *3 (C.D. Cal. June 21, 2012) (alterations in the original).

"[I]n assessing whether the second action is duplicative of the first," courts borrow from the test for claim preclusion and examine whether: (1) the claims asserted and relief sought in both actions are the same and (2) the parties in both actions are the same or in privity with one another. *Adams*, 487 F.3d 688-89. When considering duplicative suits in a class action context, "the classes, and not the class representatives, are compared." *Weinstein v. Metlife, Inc.*, No. C06-04444, 2006 WL 3201045, at *4 (N.D. Cal. Nov. 6, 2006).

1. *Similarity of Claims and Relief Sought*

To determine whether a successive lawsuit involves the same claims as a prior case, the Ninth Circuit applies the following criteria: "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982). In the present case, the factors weigh in favor of a finding that the Chowning Action duplicates the earlier-filed Russell Action as to the injunctive relief sought.

Both cases arise out of the same transactional nucleus of events and allege that Defendant implemented a false price-comparison-advertising scheme to ensnare consumers searching for a bargain. The consumers in both cases also seek identical remedies in the form of restitution and injunctive relief. Moreover, the two suits involve infringement of the same rights, namely, the protections afforded by California's consumer protection laws. Finally, the exhibits accompanying the motions for class certification filed in both the Russell Action and the Chowning Action demonstrate a substantial overlap in the evidence. *Compare* (Russell Mot. Class Certification, No. 15-1143, ECF No. 25) *with* (Chowning Mot. Class Certification, No. 15-8673, ECF No. 51.) Both cases rely on: plaintiffs' declarations about the effect of the advertising, receipts displaying plaintiffs' purchases, Defendant's corporate records and policies, and expert testimony about consumer purchasing decisions.

Accordingly, the same facts, legal arguments, evidence, and remedies are implicated in both the Chowning and Russell Actions.

2. *Similarity of Parties*

The second prong requires the parties in the later-filed action to be the same as or in privity with the parties in the earlier-filed action. Even though Plaintiff was not a party or named plaintiff in the prior Russell Action, the circumstances demonstrate that she was adequately represented to justify preclusion.

The Supreme Court has confirmed that "a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the [prior] suit. Representative suits with preclusive effect on nonparties include *properly conducted class actions*." *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008). The Court later emphasized "that a 'properly conducted class action,' with binding effect on nonparties, can come about in federal courts in just one way—through the procedure set out in Rule 23." *Smith*, 564 U.S. at 131. Finally, the Court again reiterated that only a certified class can have preclusive effect on putative class members "because a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013).

Numerous district courts have exercised their discretion and applied the rule against duplicative actions to dismiss later-filed, identical class actions. *Moreno v. Castlerock Farming & Transp., Inc.*, No. CIV-F-12-0556, 2013 WL 1326496, at *1 (E.D. Cal. Mar. 29, 2013) (collecting cases); *Cohen v. Trump*, No. 10-CV-0940, 2014 WL 690513, at *4 (S.D. Cal. Feb. 21, 2014) ("[T]he Court disagrees with Plaintiff's assertion that the claim splitting doctrine does not apply to class action complaints . . . ."); *Beckerley v. Alorica, Inc.*, No. SACV 14-0836, 2014 WL 4670229, at *6 (C.D. Cal. Sept. 17, 2014) ("Based on these various authorities, the Court is not persuaded that there is a blanket class actions exception from the rule against claim splitting.").

Here, Plaintiff's class seeking injunctive relief satisfies the second prong of the preclusion test. In the Russell Action, this Court properly certified an identical class seeking injunctive relief based on the same legal arguments, factual background, and evidence. In doing so, the Court proceeded through the Rule 23 analysis and ensured that adequate representation exists to protect the interests of putative class members, including Plaintiff.

Accordingly, the Court rejects Plaintiff's injunctive class as duplicative of the earlier-filed Russell Action.

B. CLRA Class

The only remaining claim is one for monetary damages under the CLRA. This Court's prior summary judgment order "dispose[d] of Plaintiff's claim for restitution under the CLRA, but d[id] not address any other available remedies allowed under the CLRA" such as punitive or actual damages. (Order Granting Def.'s Summ. J. 14, ECF No. 112.). Thus, Plaintiff can only move for certification of a CLRA class to the extent the class seeks non-restitutionary monetary damages

In her motion for class certification, Plaintiff does not advance any non-restitutionary theory of damages under the CLRA. The motion contains no mention of punitive damages, statutory damages, or actual damages. Instead, Plaintiff "seeks the measure of CLRA damages that was approved in *Spann*. That is the difference between the amount that each class member paid and the 'actual value' of that which they received." (Pl.'s Mot. Class Certification 18, ECF No. 53) In other words, Plaintiff seeks restitution—a request this Court has already denied. Accordingly, the Court denies certification of the CLRA class.

V. CONCLUSION

Accordingly, the Court **DENIES** Plaintiff's Motion for Class Certification.

IT IS SO ORDERED.

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Initials of Preparer ______________